No. 95-1713

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1996

Anne N. Gaylor; Annie Laurie Gaylor; Daniel E. Barker; Glenn V. Smith; Jeff Baysinger; Lora Attwood; The Freedom From Religion Foundation, Inc.; and The Colorado Chapter of the Freedom From Religion Foundation, Inc.,

Petitioners,

v.

The United States of America; The Department of The Treasury; Lloyd W. Bentsen, Secretary of the Treasury; and Mary Ellen Winthrow, Treasurer of the United States,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Did the Court below err by refusing to allow the introduction of any evidence on whether a reasonable observer would consider "In God We Trust" to be an endorsement of religion?

Did the Court below err by holding, as a matter of law, that a reasonable observer would not view "In God We Trust" as an endorsement of religion?

LIST OF PARENT AND SUBSIDIARY COMPANIES

There is no parent or subsidiary company to be listed.

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Petitioners respectfully petition for a writ of certiorari to review the judgment entered by the United States Court of Appeals for the Tenth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 74 F.3d 214 (10th Cir. 1996) and is reprinted in the Appendix ("App.") to this petition at App. A. The Tenth Circuit's decision affirmed the decision of the United States District Court for the District of Colorado. That Court's opinion is reprinted at App. B.

STATEMENT OF JURISDICTION OF THE COURT

The decision of the United States Court of Appeals for the Tenth Circuit was entered on January 23, 1996. App. A-6. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 1.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of

the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

31 U.S.C. 186. National Motto.

The national motto of the United States is declared to be "In God we trust."

31 U.S.C. § 321. General Authority of the Secretary.

(a) The Secretary of the Treasury shall--

(4) mint coins, engrave and print currency and security documents, and refine and assay bullion, and may strike medals.

31 U.S.C. § 5112. Denominations, specifications, and design of coins.

(d)(1). United States coins have the inscription "In God We Trust". The obverse side of each coin has the inscription "Liberty". The reverse side of each coin has the inscriptions "United States of America" and "E Pluribus Unum" and a designation of the value of the coin. The design on the reverse side of the dollar, half dollar, and quarter dollar is an eagle. The eagle on the reverse side of the dollar is the

symbolic eagle of Apollo 11 landing on the moon. The obverse side of the dollar has the likeness of Susan B. Anthony. The coins have an inscription of the year of minting or issuance. However, to prevent or alleviate a shortage of denomination, the Secretary may inscribe coins of the denomination with the year that was last inscribed on coins of the denomination.

31 U.S.C. § 5114. Engraving and printing currency and security documents.

(b) United States currency has the inscription "In God We Trust" in a place the Secretary decides is appropriate. Only the portrait of a deceased individual may appear on United States currency and securities. The name of the individual shall be inscribed below the portrait.

STATEMENT OF THE CASE

This case was initiated by the filing of a complaint in the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1331 and §1346(a)(2) on June 8, 1994. App. C. At issue are federal statutes declaring "In God we trust" to be the official motto of the United States and requiring the motto to be imprinted on all U.S. coins and currency.

Petitioners (Plaintiffs below) are (1) a nonprofit corporation which promotes the separation of church and state, (2) its Colorado chapter, and (3) several individuals who are citizens of the United States and of either the State of Wisconsin or Colorado who pay federal and state taxes. Respondents (Defendants below) are the United States, the U.S. Department of the Treasury, the Secretary of the Treasury and the Treasurer of the United States.

Respondents filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) for failure of the complaint to state a claim. That motion was granted by the District Court on November 25, 1994[1] (App. B) and was affirmed by the United States Court of Appeals for the Tenth Circuit on January 23, 1996 (App. A).

REASONS FOR GRANTING THE WRIT

This case was dismissed on the pleadings. Although the central question involved is whether a "reasonable observer" would view "In God We Trust" as government endorsement of religion, Petitioners were not allowed to present any evidence on this issue. Based solely on the pleadings and with no facts whatsoever to support it, the Tenth Circuit concluded "(W)e find that a reasonable observer, aware of the purpose, context, and history of the phrase 'In God we trust,' would not consider it...to be an endorsement of religion." App. A-6.

The issue presented in this case goes to the heart of Establishment Clause law. That issue is whether a court may make findings on the question of "reasonable observer" without a consideration of all relevant facts. Stated in the form of a question, can a court make an *a priori* determination about the "reasonable observer" on the basis of the pleadings alone without regard to facts which bear directly on this issue? This is a matter of first impression with this Court. It is one which needs to be resolved in order to prevent judicial inconsistency in this important, developing area.

The so-called endorsement test, of which the "reasonable observer" is an integral part, was first advanced by Justice O'Connor concurring in *Lynch v. Donnelly*, 465 U.S. 668, 690-692 (1984). It

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[1] Although the District Court Order is dated December 25, 1994, it was stamped as filed with the Court Clerk on November 25, 1994.

gained acceptance by a majority of the Court in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989). The endorsement test is now considered to be controlling in cases involving the *effect* of an alleged religious practice or pronouncement by government. The test says that, if in the eyes of a "reasonable observer" a government practice has the *effect* of endorsing or appearing to endorse religion, such practice violates the Establishment Clause. *Id.* at 592-597.

The endorsement test was dealt with by this Court in *Capitol Square Review and Advisory Bd. v. Pinette*, ____ U.S. ____, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). Petitioners read the plurality there to hold that the test does not apply to a private religious display in a public forum. However, in her concurrence, Justice O'Connor reaffirmed the basic validity of the test. In doing so, she described "reasonable observer" as "similar to the 'reasonable person' in tort law, who 'is not to be identified with any ordinary individual, who might occasionally do unreasonable things' but is 'rather a personification of a community ideal of reasonable behavior, determined by the (collective) social judgment.'" *Id.* at 2455. (Citations omitted).

It is axiomatic that the reasonable person determination in tort law is a question of fact, or at the very least of mixed law and fact, to be decided by the jury. *65A C.J.S., Negligence* 252a. Applying Justice O'Connor's logic, the "reasonable observer" falls within the same category. It cannot be resolved merely by looking at the pleadings, without more. Yet, that is precisely what the Tenth Circuit did in this case.

Petitioners had intended to introduce the results of a survey conducted by an independent research firm. App. D. The survey, which was composed of a representative cross-section of the American public, shows that a strong majority believes "In God We Trust" constitutes endorsement of religion. App. D-5-6.

By dismissing the case on the pleadings, the Tenth Circuit refused to give any consideration to the survey. However, after rejecting the survey's introduction, the Court then attempted to undermine it by reiterating Justice O'Connor's statement "(W)e do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think (the State) endorses religion." App. A-5. This is a serious mischaracterization of the survey results. Those results show that well over 50% of the 900 people polled are of the opinion that "In God We Trust" endorses religion. *See* App. D-5-6.

The opinion of the Tenth Circuit asserts that the motto "is a form of 'ceremonial deism' which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief." App. A-4. There is simply no record to support this conclusion or, for that matter, *any* conclusion about ceremonial deism. The Court refused to allow Petitioners to introduce evidence about the history of the motto, the intent of those who promoted its use, and how it is perceived.

This Court's decisions sustaining ceremonial deism appear to center on two basic concepts. First, the questioned practice must have been prevalent at or around the time this republic was founded. *See*, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983). Second, and perhaps, alternatively, it is a practice which, by "history and ubiquity", has come to be accepted as purely secular. *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. at 625 (Justice O'Connor concurring). Petitioners had intended to introduce expert testimony that "In God We Trust" on money first appeared on a limited number of coins in the mid 1860s and that it was adopted as our national motto and required to be imprinted on all currency in 1956, nearly one hundred years later. This evidence would demonstrate that the *Marsh v. Chambers* line of reasoning does not apply to "In God We Trust". Further, the survey results and witness

testimony would show that the American public does not consider "In God We Trust" to be purely secular. Therefore, whichever of the two decisional bases for ceremonial deism one chooses, evidence of the kind that Petitioners would have submitted is most pertinent to the inquiry.

When the Tenth Circuit concluded that "(A) reasonable observer, aware of the purpose, context, and history of... 'In God we trust,' would not consider it...to be an endorsement of religion" (App. A-6), it did so devoid of any facts to support that conclusion. Indeed, the Court refused even to conduct the most basic of inquiries into this area. The effect of this is to say that no facts, however pertinent, have any bearing on this issue.

This decision of the Tenth Circuit here is in conflict with that of the Ninth Circuit in *American Jewish Congress v. City of Beverly Hills*, 65 F.3d 1539 (9th Cir. 1995). There, the Court held that there was a "triable issue" as to whether or not a reasonable observer would view a privately placed Menorah on public grounds as a prohibited endorsement of religion. *Id.* at 1546.

In *Creatore v. Town of Trumbull*, 68 F.3d 59 (2d Cir. 1995), the Second Circuit sketched the history of this Court's recent divisions of opinion on the endorsement test and how the "reasonable observer" has been the subject of conflicting views by members of this Court. *Id.* at 61. A reading of the Second Circuit's discussion illustrates the high degree of confusion involved.

The endorsement test and its embodiment of the "reasonable observer" are likely to dominate Establishment Clause controversies in the years ahead. It is, therefore, essential that this Court provide the guidance needed to avoid inconsistency and uncertainty in this important area of the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 19, 1996

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

ANNE N. GAYLOR, ANNIE LAURIE GAYLOR, DANIEL E. BARKER, GLENN V. SMITH, JEFF BAYSINGER, LORA ATWOOD, THE FREEDOM FROM RELIGION FOUNDATION, INC., AND THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.,	)
Plaintiffs - Appellants,	)
v.	) No. 95-1033
UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF TREASURY, LLOYD BENTSEN, Secretary of the Treasury, MARY ELLEN WINTHROW, Treasurer of the United States,	)
Defendants - Appellees,	)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. Ct. No. 94-S-1345)

Robert R. Tiernan, Denver, Colorado, for Appellants.

Patricia A. Millett, Attorney, Appellate Staff Civil Division, Department of Justice, Washington, DC (Michael Jay Singer, with

her on the brief) for the Appellees.

Before TACHA, LOGAN, and REAVLEY,* Circuit Judges.

TACHA, Circuit Judge.

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* The Honorable Thomas M. Reavley, Senior Circuit Judge, United States Court of Appeals for the Fifth Circuit, sitting by designation.

Plaintiffs Anne N. Gaylor, Annie Laurie Gaylor, Daniel E. Barker, Glenn V. Smith, Jeff Baysinger, Lora Atwood, the Freedom from Religion Foundation, Inc., and the Colorado Chapter of the Freedom from Religion Foundation, Inc. (collectively "the Foundation") sued the United States, the Department of the Treasury, Secretary of the Treasury Robert E. Rubin, and Treasurer Mary Allen Winthrow seeking declaratory and injunctive relief against further use of the national motto, "In God we Trust," and its reproduction on United States currency. The Foundation contends that the motto and its appearance on U.S. currency violate the Establishment Clause of the First Amendment. The district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b) (6) for failure to state a claim, and the Foundation appeals. We exercise jurisdiction under 28 U.S.C. § 1291 and affirm.

We review an order of dismissal pursuant to Fed. R. Civ. P.12 (b)(6) de novo. *Industrial Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 967 (10th Cir. 1994). The Tenth Circuit has not yet settled upon the appropriate standard of review for "constitutional facts" in Establishment Clause cases. *Robinson v. City of Edmond*, 68 F.3d 1226, 1230 n.7 (1995). However, we do not feel compelled to resolve that question here because the facts in this case are insufficient to support the Foundation's claims under either a de novo or a clearly erroneous standard. In addition, we assume, without deciding, that the Foundation has standing to assert its claim.

The Foundation specifically challenges 36 U.S.C. § 186 (establishing the national motto "In God we trust"), 31 U.S.C. § 5112 (d) (1) (requiring inscription of the motto on coins of the United States), and 31 U.S.C. § 5114 (b) (requiring inscription of the motto on printed currency of the United States). We begin by analyzing these statutes under the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *Lemon* test requires that, in order to be valid under Establishment Clause, a statute must (1) have

a secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) avoid excessive government entanglement with religion. *Id.* at 612-13. The statutes establishing the national motto and directing its reproduction on U.S. currency clearly have a secular purpose. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 625 (1989) (O'Connor, J., concurring); *Lynch v. Donnelly*, 465 U.S. 668, 692-93 (1984) (O'Connor, J., concurring); *id.* at 716-17 (Brennan, J., dissenting). The motto symbolizes the historical role of religion in our society, *Lynch*, 465 U.S. at 676, formalizes our medium of exchange, see *O'Hair v. Blumenthal*, 462 F. Supp. 19, 20 (W.D. Tex.), *aff'd sub nom. O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1978) (per curiam), *and cert. denied*, 442 U.S. 930 (1979), fosters patriotism, *see Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970), and expresses confidence in the future, *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring). The motto's primary effect is not to advance religion; instead, it is a form of "ceremonial deism" which through historical usage and ubiquity cannot be reasonably understood to convey government approval of religious belief. *Allegheny*, 492 U.S. at 625 (O'Connor J., concurring); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) *id* at 716 (Brennan, J., dissenting). Finally, the motto does not create an intimate relationship of the type that suggests unconstitutional entanglement of church and state. *O'Hair*, 462 F. Supp. at 20. Thus the statutes establishing the motto and requiring its reproduction on U.S. currency easily meet the requirements of the *Lemon* test.

While *Lemon* is still good law, the Supreme Court has declined to apply the *Lemon* test in several recent Establishment Clause cases. *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S.Ct. 2440 (1995) (plurality opinion); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 114 S. Ct. 2481 (1994); *Lee v. Weisman*, 112 S.Ct. 2649 (1992). Instead, the Court has focused on whether the challenged government action endorses religion, *Capitol Square*, 115 S.Ct. at 2447-48; *Lamb's Chapel v. Center Moriches*

Union Free Sch. Dist., 113 S.Ct. 2141, 2148 (1993); *Allegheny*, 492 U.S. at 592, suggesting that the *Lemon* test is being supplanted by an "endorsement test." This shift of focus is particularly relevant to the case at hand because the Supreme Court has expressly prescribed the endorsement test for cases involving challenges to religious expression by the government itself. *Capitol Square*, 115 S.Ct. at 2447-48; *id.* at 2452 (O'Connor, concurring).

In addition to satisfying the *Lemon* test, the motto and its appearance on U.S. currency also fulfill the requirements of the endorsement test. The standard for assessing whether a government practice endorses religion is whether "the reasonable observer" would view the practice as an endorsement. *Id.* at 2455 (O'Connor, J., concurring). The reasonable observer, much like the reasonable person of tort law, is the embodiment of a collective standard and is thus "deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 2455 (O'Connor, J., concurring).

The application of the reasonable observer standard helps explain why we reject the Foundation's insistence upon further factfinding at the trial level, including the introduction of expert testimony and polling data. We need not engage in such empirical investigation because "we do not ask whether there is *any* person who could find an endorsement of religion, whether *some* people may be offended by the display, or whether *some* reasonable person *might* think [the State] endorses religion." *Id.* (O'Connor, J., concurring) (quoting *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1544 (6th Cir. 1992) (en banc)) (emphasis and brackets in original). "[T]he endorsement inquiry is not about the perceptions of particular individuals or saving isolated non-adherents from the discomfort of viewing symbols of faith to which they do not subscribe." *Id.* (O'Connor, J., concurring). It is instead an objective inquiry that this court is fully equipped to conduct with the facts at hand. After making that

inquiry, we find that a reasonable observer, aware of the purpose, context, and history of the phrase "In God we trust," would not consider its use or its reproduction on U.S. currency to be an endorsement of religion.

Our decision is confirmed by the statements of the Supreme Court and the decisions of other circuit courts that have addressed the question. The Supreme Court has noted, for example, that "[o]ur previous opinions have considered in dicta the motto and the pledge (of allegiance), characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief." *Allegheny*, 492 U.S. at 602-03; *see also id.* at 625 (O'Connor, J., concurring); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring); *id.* at 716-17 (Brennan, J., dissenting); *School District of Abington Township v. Schempp*, 374 U.S. 203, 303 (Brennan, J., concurring); *Engel v. Vitale*, 370 U.S. 421, 449-50 (Stewart, J., dissenting). While these statements are dicta, this court considers itself bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540 n.10 (10th Cir. 1995). Moreover, the two other circuit courts that have specifically addressed this question have held that the motto and its use on U.S. currency do not offend the Establishment Clause. *Aronow*, 432 F.2d 242; *O'Hair v. Murray*, 588 F.2d 1144 (5th Cir. 1978) (per curiam), *cert. denied sub nom. O'Hair v. Blumenthal*, 442 U.S. 930 (1979).

We conclude, therefore, that the statutes establishing "In God we trust" as our national motto and providing for its reproduction on United States currency do not violate the Establishment Clause. Accordingly, we AFFIRM.

January 23, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel B. Sparr

Civil Action No. 94-S-1345

ANNE N. GAYLOR, et al.,
Plaintiffs,

v.

THE UNITED STATES OF AMERICA, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the court on the Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), filed August 29, 1994. The court has reviewed the motion, the Plaintiffs' response, the entire case file, and the applicable law and is fully advised in the premises. The court has determined that oral argument will not materially assist resolution of this matter.

Plaintiffs are individual taxpayers, citizens of the United States, and members of The Freedom From Religion Foundation, Inc., a nonprofit corporation with one of its "primary objectives" being "to promote the constitutional principle of separation of church and state." Plaintiffs allege that the national motto of the United States, "In God We Trust," as established by 36 U.S.C. § 186, and the statutes requiring printing of that motto on United States coins and currency, 31 U.S.C. § 5112 (d)(1), as amended October 6, 1992, and 31 U.S.C. § 5114 (b), are unconstitutional violations of the Establishment Clause of the First Amendment to the

U.S. Constitution.[1] Defendants move to dismiss this civil action because the law is clear that the national motto and these two statutes do not violate the Establishment Clause.

Applying Rule 12 (b)(6), the court should not dismiss this cause of action for failure to state a claim unless the court determines that the Plaintiffs can prove no set of facts that would entitle them to relief. *Tri-Crown, Inc. v. American Fed. Sav. & Loan Ass'n.*, 908 F.2d 578, 582 (10th Cir. 1990). The court must liberally construe all of the Plaintiffs' pleadings, must accept all factual allegations as true, and must draw all reasonable inferences in favor of the Plaintiffs. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Grider v. Texas Oil & Gas Crop.*, 868 F.2d 1147, 1148 (10th Cir.) *cert. denied*, 110 S.Ct. 76 (1989); *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). So long as the Plaintiffs offer evidence in support of a legally recognized claim for relief, a motion to dismiss must be denied. *Hiatt v. Schreiber*, 599 F. Supp. 1142,1145 (D. Colo. 1984).

The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion...." The Supreme Court has applied a three-pronged test to determine whether legislation comports with the Establishment Clause. *County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989), citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971); *Edwards v. Aguillard*, 482 U.S. 578, 582-83 (1987), citing *Lemon* 403 U.S. at 612-13.

First, the legislation must have a secular purpose. The secular purpose prong asks whether government's actual purpose is to

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[1] The sections regarding coins and currency were formerly codified at 31 U.S.C. §§ 324 and 324a, respectively, but were recodified to their present sections in 1982.

endorse or disapprove of religion. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring), *reh'g. denied*, 466 U.S. 994. A governmental purpose to promote religion may be evidenced by promotion of religion in general or by advancement of a particular religious belief. *Edwards*, 482 U.S. at 585 (citations omitted). The Supreme Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. *Lynch*, 465 U.S. at 680 (citations omitted). The purpose need not be exclusively secular, *Lynch*, 465 U.S. at 681 n. 6, but the purpose may not be to endorse or disapprove of religion. *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

Second, the legislation's primary effect must be one that neither advances nor inhibits religion in its principal or primary effect. In decisions subsequent to *Lemon*, 403 U.S. at 602, the Supreme Court has refined the definition of governmental action that unconstitutionally advances religion. The Court has paid particular attention to whether the challenged governmental practice has either the purpose or effect of "endorsing" religion. *Allegheny*, 492 U.S. at 592-93 (citations omitted). The prohibition against governmental endorsement of religion precludes government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. *Allegheny* 492 U.S. at 593 (citations omitted). At the very least, the Establishment Clause prohibits government from appearing to take a position on questions of religious belief or from making adherence to a religion relevant in any way to a person's standing in the political community. *Allegheny*, 492 U.S. at 593-94, citing *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring).

Third, the legislation must not result in an excessive entanglement with religion. In order to determine whether government entanglement with religion is excessive, the court must

"examine the character and purposes of the institutions that are benefitted,...,and the resulting relationship between the government and the religious authority." *Lemon*, 403 U.S. at 614-15.

In every Establishment Clause case, the courts "must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, ... total separation of the two is not possible." *Lynch*, 465 U.S. at 672. The Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any. *Lynch*, 465 U.S. at 673 (citations omitted). The Supreme Court has refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history." *Lynch*, 465 U.S. at 678, citing *Walz v. Tax Comm'n.*, 397 U.S. 664, 671 (1970).

In the national public life, there are many manifestations of a belief in a Supreme Being which do not violate the First Amendment. See *School District of Abington Township. Pa. v. Schempp*, 374 U.S. 203, 303-04 (1963). There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. *Lynch*, 465 U.S. at 674. Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. *Lynch*, 465 U.S. at 675. The Government has long recognized holidays with religious significance, the reference to God in the Pledge of Allegiance, the exhibition of religious art in government-supported museums, and religious emblems in public buildings, among other things. *Lynch*, 465 U.S. at 676-78; *Jager v. Douglas County School Dist.*, 862 F.2d 824, 839 (11th Cir.) *cert. denied*, 490 U.S. 1090 (1989).

Consistent with the Supreme Court's three-pronged analysis, numerous courts have found that the placement of the national motto on U.S. currency and coins does not violate the Establishment Clause of the First Amendment. In *Aronow v. United States*, the Ninth Circuit did not "discern any religious significance attendant the payment of a bill with coin or currency on which has been imprinted 'In God We Trust'...." 432 F.2d 242, 243 (9th Cir. 1970). The Ninth Circuit considered the national motto excluded from First Amendment significance because it has no theological or ritualistic impact. *Aronow*, 432 F.2d at 243. Citing *McGowan v. Maryland*, 366 U.S. 420 (1961), the Ninth Circuit concluded that the national motto did not implicate any coercive governmental power to aid religion. *Aronow*, 432 F.2d at 244.

In *O'Hair v. Blumenthal*, 462 F. Supp. 19 (W.D. Texas 1978), *aff'd.* 588 F.2d 1144 (5th Cir.), *cert. denied*, 442 U.S. 930 (1979), the court dismissed the claim that the national motto and the statutes mandating the imprinting of the motto on the coin and currency of the United States violated the First Amendment. The court concluded that the motto on coin and currency did not have the effect of advancing religion and that "it would be ludicrous to argue that the use of the national motto fosters any excessive government entanglement with religion." *O'Hair*, 462 F. Supp. at 19. The motto "In God We Trust" has been interwoven so deeply into the "fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits." *O'Hair*, 462 F. Supp. at 20, citing *Schempp*, 374 U.S. at 303.

References to the Deity in our ceremonies and on our coinage do not violate the Establishment Clause because they merely reflect the history of this nation and no longer have any potentially entangling theological significance. *Hall v. Bradshaw*, 630 F.2d 1018, 1023 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981). Certain references to God, such as the words "In God We Trust" on

American coinage, can best be understood as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. *Sherman by Sherman v. Community Consolidated School District 21 of Wheeling Township*, 1993 WL 57522 at *3 (N.D. Ill. 1993), *aff'd.*, 8 F.3d 1160 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 2109 (1994). Government acknowledgments of religion in American life, such as the printing of "In God We Trust" on our coins and currency, serve secular purposes and are not understood as conveying an endorsement of particular religious beliefs. *Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring).

The law appears clear enough that the challenged use of the national motto on our coins and currency is not unconstitutional. Assuming, without deciding, that the Plaintiffs have standing to assert their claim, the court concludes that the national motto has been determined to be historic, patriotic, or ceremonial in nature, rather than religious in significance, and does not offend the Establishment Clause of the First Amendment.

Accordingly, IT IS ORDERED:

1. The hearing scheduled Thursday December 15, 1994 at 9:00 a.m. is hereby VACATED.

2. The Defendants' Motion to Dismiss is GRANTED.

3. This civil action is DISMISSED.

4. Each party shall bear his, her, or its own costs and fees.

DATED at Denver, Colorado, this 25th day of December, 1994.

BY THE COURT:

Daniel B. Sparr
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-S-1345

ANNE N. GAYLOR; ANNIE LAURIE GAYLOR; DANIEL E. BARKER; GLENN V. SMITH; JEFF BAYSINGER; LORA ATTWOOD; THE FREEDOM FROM RELIGION FOUNDATION, INC.; and THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

V.

THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE TREASURY; LLOYD W. BENTSEN, SECRETARY OF THE TREASURY; and MARY ELLEN WINTHROW, TREASURER OF THE UNITED STATES,

Defendants.

COMPLAINT

Plaintiffs, by and through their undersigned counsel, for a complaint against the defendants, allege as follows:

JURISDICTION AND VENUE

1. This is a civil action arising under the Constitution of the United States. This Court has jurisdiction under 28 U.S.C. 1331 and jurisdiction against the United States as a defendant under 28 U.S.C. 1346(a)(2).

2. Venue is proper under 28 U.S.C. 1391(e) because defendants are the United States, an agency of the United States, and an officer or employee of the United States acting in his official capacity and at least one of the plaintiffs is a resident of the State of Colorado.

PARTIES

3. Plaintiff Anne N. Gaylor is a citizen of the United States, a resident of the State of Wisconsin, and pays taxes to the United States and the State of Wisconsin. This Plaintiff is President of The Freedom From Religion Foundation, Inc. and a member of the Foundation's Board of Directors and its Executive Council

4. Plaintiff Annie Laurie Gaylor is a citizen of the United States, a resident of the State of Wisconsin, and pays taxes to the United States and to the State of Wisconsin. This Plaintiff is Editor of "Freethought Today", the official publication of The Freedom From Religion Foundation, Inc., and is a member of the Foundation's Board of Directors.

5. Plaintiff Daniel E. Barker is a citizen of the United States, a resident of the State of Wisconsin, and pays taxes to the United States and to the State of Wisconsin. This Plaintiff is Director of Education of The Freedom From Religion Foundation, Inc. and is a member of the Foundation's Board of Directors. Plaintiff Barker is an ordained Christian minister and has Native American ancestry.

6. Plaintiff Glenn V. Smith is a citizen of the United States, a resident of the State of Colorado, and pays taxes to the United States and to the State of Colorado. This Plaintiff is a veteran of World War II, a retired railroad engineer, and is a member of The Freedom From Religion Foundation, Inc. and the

Foundation's Colorado Chapter. Plaintiff Smith has Native American ancestry.

7. Plaintiff Jeff Baysinger is a citizen of the United States, a resident of the State of Colorado, and pays taxes to the United States and to the State of Colorado This Plaintiff is a federal employee, is a member of The Freedom From Religion Foundation, Inc., and is a member and chief executive officer of the Foundation's Colorado Chapter.

8. Plaintiff Lora Attwood is a citizen of the United States, a resident of the State of Colorado, and pays taxes to the United States and to the State of Colorado, and is a member of The Freedom From Religion Foundation, Inc. and the Foundation's Colorado Chapter.

9. Plaintiff The Freedom From Religion Foundation, Inc. is a nonprofit corporation existing under the laws of the State of Wisconsin and qualified to do business in the State of Colorado. One of the Foundation's primary objectives is to promote the constitutional principle of separation of church and state and to take action against infractions of this principle. The Foundation's Colorado Chapter is an association constituted of Foundation members who promote the Foundation's objectives in the State of Colorado.

10. Defendant The United States of America is the constitutionally established government of the United States.

11. Defendant The Department of the Treasury is an executive department of the United States government.

12. Defendant Lloyd W. Bentsen is the Secretary of the Treasury. Under 31 U.S.C. 321(a)(4), the Secretary of the Treasury is authorized by law to mint coins and to engrave and print currency.

One of the facilities where coins are minted is located in Denver, Colorado.

13. Defendant Mary Ellen Winthrow is Treasurer of the United States. Defendant Winthrow is authorized by law to sign United States currency.

CLAIM FOR RELIEF

14. Pursuant to 36 U.S.C. 186, the national motto of the United States is "In God We Trust".

15. Pursuant to 31 U.S.C. 5112, Defendant Secretary of the Treasury Lloyd W. Bentsen is authorized to mint and issue coins. 31 U.S.C. 5112(d)(1) requires that United State coins have the inscription "In God We Trust". Based on information and belief, all United States coins minted and issued by Defendant Bentsen have such inscription.

16. Pursuant to 31 U.S.C. 5114, Defendant Secretary of the Treasury Lloyd W. Bentsen is authorized to engrave and print United States currency. 31 U.S.C. 5114(b) requires that such currency have the inscription "In God We Trust". On information and belief, all United States currency engraved and printed by Defendant Bentsen has such inscription. Such currency bears the signature of Defendant Treasurer of the United States, Mary Ellen Winthrow.

17. The statutes cited in Paragraphs 14 through 16 herein, and each of them, are laws respecting an establishment of religion in violation of Amendment One of the Constitution of the United States of America. Such laws (1) do not have a legitimate secular purpose, (2) have the principal or primary effect of advancing or endorsing religion, and/or (3) foster excessive government entanglement with religion.

18. The acts and practices of Defendants Bentsen and Winthrow, in implementing the statutes cited in Paragraphs herein, are in violation of Amendment One of the Constitution of the United States of America in that they (1) do not have a legitimate secular purpose, (2) have the principal or primary effect of advancing or endorsing religion, and/or (3) foster excessive government entanglement with religion.

19. Defendants Bentsen and Winthrow have a duty to uphold the Constitution of the United States of America. Said Defendants have violated, and continue to violate, that duty by minting and issuing coins and by printing and signing currency inscribed with the phrase "In God We Trust".

20. Plaintiffs have standing because they are injured and because their right to a government which complies with the Constitution of the United States is violated. Plaintiffs are insulted and offended by the phrase "In God We Trust" as our national motto and by its inscription on United States coins and currency. Several Plaintiffs have altered their behavior as a result of the laws and practices complained of herein.

21. Individual Plaintiffs' rights as taxpayers are violated in that the practices complained of herein result in the expenditure of taxpayer funds and the use of taxpayer assets for unconstitutional purposes.

22. The Freedom From Religion Foundation, Inc. and its Colorado Chapter have standing because (a) their members otherwise have standing to sue in their own right, (b) the interests sought to be protected are germane to the Foundation and its Colorado Chapter, and (c) neither the claims asserted nor the relief requested require the participation of individual members.

WHEREFORE, Plaintiffs pray for relief and judgment as follows:

I. To declare that 36 U.S.C. 186 establishing "In God We Trust" as the national motto of the United States violates the Constitution of the United States of America;

II. To enjoin the Defendants from implementing 36 U.S.C. 186;

III. To declare that 31 U.S.C. 5112(d)(1) and 5114(b) and any other law which requires or permits the phrase "In God We Trust" to be inscribed on United States coin or currency violates the Constitution of the United States;

IV. To enjoin the Defendants from implementing 31 U.S.C. 5112(d)(1) and 5114(b) or any other law that requires or permits the phrase "In God We Trust" to be inscribed on United States coin or currency;

V. To enjoin the Defendants from inscribing, signing, or allowing their signatures to appear on any United States coin or currency which is inscribed with the phrase "In God We Trust";

VI. For costs, expert witness fees, and attorneys fees as may be allowed by law,

VII. For such other and further relief as the Court may deem proper.

Respectfully submitted,

Robert R. Tiernan
Attorney for the Plaintiffs
3515 S. Tamarac Drive #200
Denver, CO 80237
(303) 757-8733

June 8, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-S-1345

ANNE N. GAYLOR; ANNIE LAURIE GAYLOR; DANIEL E. BARKER; GLENN V. SMITH; JEFF BAYSINGER; LORA ATTWOOD; THE FREEDOM FROM RELIGION FOUNDATION, INC.; and THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA; THE DEPARTMENT OF THE TREASURY; LLOYD W. BENTSEN, SECRETARY OF THE TREASURY; and MARY ELLEN WINTHROW, TREASURER OF THE UNITED STATES;

Defendants.

AFFIDAVIT OF SHARON R. CHAMBERLAIN

I, Sharon R. Chamberlain, being duly sworn, do hereby make the following affidavit:

1. I am the President and sole owner of Chamberlain Research Consultants. I have been in the polling business since 1988.

2. Chamberlain Research Consultants (CRC) is an independent, full-service market research firm. We are located at 4801 Forest Run Road in Madison, Wisconsin and have been in

business since 1988. The firm has been solely owned by me since June of 1990; prior to that, it was a branch of Matousek and Associates, where I was a partner.

3. Wisconsin Interviewing Services (WIS) is the field service owned by CRC. The field service includes a phone bank and focus group facility. WIS is responsible for the actual collection of data. CRC is responsible for research design and analysis. CRC/WIS employs approximately six full-time and 25 to 50 part-time people at any given time.

4. CRC/WIS clients include: school districts, utility companies, political candidates, lobbyists, restaurants and food manufacturers, trade associations, ad agencies and design firms, marketing firms, insurance companies, government agencies, law firms, new product developers, newspapers, and radio stations.

5. CRC was contracted by the Freedom From Religion Foundation, Inc. to conduct a poll on the use of the phrase "In God We Trust" as seen on U.S. currency. The poll was conducted with 900 adults across the nation. The number of surveys was chosen to provide a sufficient margin of error, in other words, approximately ±3%.

6. CRC purchased a random sample telephone list from Scientific Telephone Samples (STS) in California for use in this study. STS was instructed by CRC to draw the numbers proportionately to population across all 50 states. The sample was generated so that unlisted phone numbers were not excluded from the sample.

7. Quotas were set for gender based on the most recent U.S. Census data available (1990: 52% female, 48% male). The gender constraints were placed on the sample because past experience has shown us that the proportion of women who answer

the telephone is higher than the actual proportion of women in the population.

8. The poll was in the field May 18-23, 1994. All surveys were conducted from a supervised phone bank. Over 10% of the interviews were monitored by a supervisor through our special phone system, and/or called back for transcription verification. Over 10% of the keying-in data entry was also verified.

9. Among the employees of CRC and WIS who assisted with this survey, in addition to me, were: Janeen Potts, Interim Field Service Director; Rob Padley, Supervisor; Ryan Randall, Supervisor; and Nicole Wyrembeck, Senior Analyst.

10. Attached as Exhibit A is the survey form with raw data, exact questions and their responses.

11. This poll establishes that the majority of those surveyed believe that the phrase "In God We Trust" is religious, as opposed to non-religious, and endorses a belief in God. As for endorsing religion over atheism, almost 11% of the respondents did not choose yes or no. Of those who did give an opinion, the majority agreed that the phrase does endorse religion over atheism.

12. The margin of error for this poll was ±3.22% at the 95% confidence level.

13. This poll was conducted in accordance with generally accepted standards in the industry.

Further, the affiant sayeth not.

Sharon R. Chamberlain

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

Subscribed and sworn to before me this 14th day of September, 1994.

Jacklyn M. Sande
Notary Public

My commission expires: 2-19-97

MOTTO TEST: Raw Data

Job # 132
May 18-23, 1994
Sample Size = 900
Margin of Error = ±3.22%

Sex: Male 48% Female 52%

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Hello, this is _____ from Chamberlain Research. Tonight we're doing a one minute survey with people across the nation. Am I speaking with someone who is over the age of 18? (If not, ask to speak with someone who is, terminate if none)

The United States is currently working on redesigning US currency. The topic of my three questions is the motto "In God We Trust," as seen on US currency.

1. Is "In God We Trust" religious or non-religious?

Religious.....550
61.1%

Non-religious.....271
30.1%

DK.....79
8.8%

2. Does "In God We Trust" endorse a belief in God?

Yes.....641
71.2%

EXHIBIT A

No.....217
24.1%

DK.....42
4.7%

3. Does "In God We Trust" endorse religion over atheism?

Yes.....480
53.3%

No.....322
35.8%

DK.....98
10.9%